IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH

SATURDAY, THE 1ST DECEMBER 2007 / 10TH AGRAHAYANA 1929

S.T. REV. No.319 of 2003

AGAINST THE ORDER DATED 12.12.2001 IN TA No.103 of 2001
OF SALES TAX APPELLATE TRIBUNAL, TRIVANDRUM.

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REVISION PETITIONER/Respondent/Revenue:-

State of Kerala.

BY Spl. Govt. Pleader Sri.Vinod Chandran.

RESPONDENT/Respondent/Assessee:-

M/s. Reliance Construction Company,
Kollam.

BY Adv. Sri.S.Santhosh Kumar.

THIS SALES TAX REVISION HAVING COME UP FOR ADMISSION ON 01/12/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:-

H.L.Dattu, C.J. & K.M.Joseph, J.

S.T.Rev.No.319 of 2003

Dated, this the 1st day of December, 2007

ORDER

H.L.Dattu,C.J.

Assessee is a works contractor. For the assessment year 1993-94, he had executed certain works entrusted to him by Kerala Water Authority. The assessing authority had completed the regular assessment under Section 5(1) of the Kerala General Sales Tax Act, 1963 ("Act" for short) by its order dated 17.3.1999. The assessee had filed an appeal against the said assessment order. The appellate authority had allowed the appeal and had remanded the matter to the assessing authority to pass fresh assessment order in accordance with law.

(2) After such remand, the assessee had filed an application under Rule 30A of the Kerala General Sales Tax Rules ("Rules" for short) in Form 21B, requesting the assessing authority to permit him to pay the tax at the compounded rate.

(3) After receipt of that application, the assessing authority had issued a notice dated 24.7.2000, informing the assessee that he is not eligible and entitled for payment of tax at the compounded rate, since the application filed by the assessee is a defective application. In the show cause notice, the assessing authority had noticed as under:-

> *"I therefore request you to opt for payment of tax as mentioned in sub section 7(A) of section 7. Since the option exercised by you is not complete it is proposed to reject the same and to complete the assessment as provided under section 5(1) of the KGST Act '63 as already proposed in this office notice dated 4.7.2000. Objection if any against the proposal may be filed at 11 AM on 31.7.2000 in my office at Kollam with supporting documents".*

(4) After receipt of the notice, petitioner had filed his reply dated 8.8.2000. In that, once again, he had requested the assessing authority to complete the assessment only under Section 7(7) of the Act and not under Section 7(7A) of the Act.

(5) After receipt of the reply so filed, the assessing authority has proceeded to complete the assessment by his order dated 8.8.2000 under Section 7(7A) of the Act.

(6) Aggrieved by the aforesaid order, the assessee was before the first appellate authority, who, by his order dated 15.2.2001, has rejected the appeal.

(7) The assessee had carried the matter by way of second appeal before the Tribunal in T.A.No.103 of 2001. The Tribunal by its order dated 12.12.2001 has directed the assessing authority to complete the assessments in the petitioner's case under Section 7(7) of the Act and not under Section 7(7A) of the Act. Aggrieved by the aforesaid order passed by the Tribunal, the Revenue is before us in this Sales Tax Revision.

(8) The Revenue has framed the following question of law for our consideration and decision. It is as under:

> "Whether the Tribunal was correct in levying tax under Section 7 clause (7A) of the KGST Act?"

(9) In our view, after going through the show cause notice dated 24.7.2000 and the reply filed by the assessee dated 8.8.2000 and also the orders of assessment passed by the assessing authority and the orders of the Tribunal, the only question that would arise for consideration is, whether the assessing authority was justified in completing the assessment under Section 7 of the Act? Be it under Section 7(7) or under Section 7(7A) of the Act?

(10) Section 7(7) of the Act permits a contractor in civil works of construction of buildings, bridges, roads, etc. to offer his option for payment of tax instead of paying tax in accordance with Clause (iv) of that sub-section, pay tax at the rate of two percent on the whole amount of contract. The procedure for payment of tax at the compounded rate etc., is as provided in the Act and the rules framed thereunder. Sub-section 7(7A) of the Act carves out an exception. That is, a contractor, who is not covered by sub-section (7) of Section 7, may also offer to pay tax in stead of paying tax under sub-section (7) of Section 7 on the whole amount of contract at the rate of seventy five per cent of the rates shown in the Fourth Schedule against such contract, less any tax paid by him under this Act on the purchase of any goods used in such contract, the transfer of which to the works contract was effected without any processing or manufacture.

(11). Rule 30 of the rules provides for the procedure of making an application for permission to pay tax at the compounded rate and its acceptance by the assessing authority. Every dealer other than a contractor who is eligible to pay tax at the compounded rate under Section 7 of the Act and who desires to exercise his option under the Section may apply to the assessing authority in Form 21 for permission to pay tax at the rates specified therein on or before the first day of May of the year to which the option relates.

(12). The assessing authority on receipt of such application and after making sufficient enquiries and after affording an opportunity of hearing shall pass an order either accepting or rejecting the application. The other sub-clauses need not be noticed by us, since they are not necessary for the purpose of disposal of the revision petition.

(13). Rule 30A of the rules provides the procedure for filing an application seeking permission to pay tax at the compounded rate in accordance with sub-section (7) of Section 7 by every contractor engaged in civil works of

construction of building, bridge, road or dam. The application shall be in Form 21 B and shall be filed before the assessing authority before the receipt of the contract amount or instalment thereof.

(14). The rule making authority has provided Form No.21B for making an application by a contractor seeking permission to pay tax under the compounded rate both under sub-section (7) and (7A). Once such application is filed and received by the assessing authority, he is expected to make enquiries and pass orders either granting or rejecting the application, he has to issue form No.21 BA to the applicant/contractor. The forms prescribed under the Rules has relevancy for the purpose of the case, and therefore, they are noticed:-

"Form No. 21 B
APPLICATION FOR PERMISSION FOR PAYMENT OF TAX UNDER SUB-SECTION 7/(7A) OF SECTION 7 BY A CONTRACTOR
(See Rule 30A)

To

The Assessing authority,
.....
.....

I, ... being a registered dealer holding registration certificate No..... dated ..... under the Kerala General Sales Tax Act, 1963 and carrying on the business of works contract, the details of which are given below do hereby apply for permission to pay the tax at the rates specified in sub-section 7/7(A) of Section 7.

Details of contract:

1. Name and address of the awarder :
2. Nature of contract :
3. Date of contract :
4. Period of contract :
5. Amount of contract :

Remarks:

I do hereby declare that the particulars furnished above are true, correct and complete.

Place: *Signature:*

Date : *Name:*

Status:

NB: 1. Particulars of each contract shall be given separately along with copy of the agreement.

2. Application shall be filed in duplicate, and shall be accompanied by permission in Form 21BA".

"Form No. 21 BA
(See Rule 21)
PERMISSION TO PAY TAX UNDER SUB-SECTION 7/(7A) OF SECTION 7

Whereas on examination I am satisfied that the applicant Sri..... is eligible for payment of tax under sub-section (7) / (7A) proviso to sub-section (7A) of Section 7 in respect of the following contracts, permission is hereby granted to pay tax on the whole contract amount on the following contracts at the rates noted against each:-

Details of contract:

Name of the awarder	Address of the awarder	Nature of Contract	Period of Contract	Amount of contract	Rate of compounded tax (percentage to contract amount)
(1)	(2)	(3)	(4)	(5)	(6)

Conditions:

1. *In respect of the contract mentioned above:*

   (a) The permission holder shall not collect any amount in excess of the rate specified in sub rule 7 / 7A of Section 7 of the K.G.S.T. Act.

   (b) The permission holder shall regularly file the return in the prescribed form within the prescribed time limit and pay the tax.

2. *This permission is liable to be suspended or cancelled if the permission holder contravenes any of the provisions of the Act and the rules made thereunder or the conditions mentioned above.*

Place: *Signature:*

Date: *(Seal).* *Designation of Assessing authority".*

(15). Having seen the relevant provisions, the procedure prescribed under the rules, now let us get back to the facts of the present case.

(16). The undisputed facts are, the assessee is a contractor and he had filed an application before the assessing authority for granting permission to pay tax at the compounded rate as provided under sub-section (7) of Section 7 of the Act. The assessing authority after receipt of the application and after making enquiries and before rejecting the application had informed the assessee that he is not eligible for permission to pay tax at the compounded rate under

sub-section (7) of Section 7 of the Act and therefore, he should make an application for payment of tax at the compounded rate under sub-section (7A) of Section 7 of the Act and otherwise, he would be completing the assessments for the assessment year in question under Section 5(1) of the Act.

(16). The assessee after receipt of the aforesaid notice dated 24.7.2000, had filed his reply, reiterating the earlier request and accord permission to pay tax at the compounded rate under sub-section (7) of section 7 of the Act.

(17). The assessing authority after receipt of the reply dated 8.8.2000 has not passed any order on the application filed by the assesee in Form 21B appended to Rule 30A of the Rules, 1963. That only means the assessing authority has neither accepted the request of the assessee for permission to pay tax at the compounded rate nor has rejected the application. However, if we may say so, very strangely has proceeded to complete the assessment for the assessment year 1993-94 under sub-section (7A) of Section 7 of the Act. When the said order was questioned by the assesee before the Tribunal, after exhausting the other statutory remedies provided under the Act, the Tribunal while allowing the assessee's appeal has directed the assessing authority to re-compute the tax liability of the assessee under sub-section (7) of Section 7 of the Act.

(18). In our view, after going through the assessment records, the whole procedure adopted by the assessing authority while completing the assessment for the assessment year in question is contrary to the provisions of the Act and the Rules framed thereunder. Therefore, we cannot sustain any of the orders passed by the authorities under the Act nor that of the Tribunal. We say so, for the following reasons.

(19) In the instant case, an assessment for the assessment year 1993-94 had been completed by the assessing authority under Section 5(1) of the Act. Being aggrieved by that order, the assessee had carried the matter in appeal. The appellate authority has remanded the matter to the assessing authority to re-frame the order in accordance with law. It is only thereafter that the petitioner had filed an application for payment of tax at the compounded rate.

(20) Under sub-rule (2) of Rule 30A of the Rules, a contractor can make an application for permission to pay tax under sub-sections (7) or (7A) of Section 7 in Form No.21B before receipt of the contract amount or instalment thereof. In the present case, admittedly, when the petitioner had filed his application for permission to pay tax at the compounded rate, he had already received the contract amount. In view of sub-rule (2) of Rule 30A of the Rules, the assessee could not have filed such an application under Section 7(7) of the Act, nor could have been accepted by the assessing authority. Be that as it may.

(21) Secondly, the assessee had filed an application before the assessing authority in Form No.21B dated nil, *inter alia*, requesting the assessing authority to permit him to pay the tax at the compounded rate. That application of the petitioner had not been accepted by the assessing authority. In fact, the assessing authority had directed the assessee to make a fresh application opting to pay tax as envisaged under sub-section (7A) of Section 7 of the Act. It was also informed to the petitioner-assessee, that if the petitioner does not file such an application, he would be left with no other alternative, but to proceed to complete the assessment under Section 5(1) of the Act.

(22) After receipt of the notice, the petitioner did not choose to file any fresh application. In fact, the assessing authority has also not permitted the assessee to pay the tax at the compounded rate under Section 7(7) of the Act or under sub-section (7A) of Section 7 of the Act.

(23) The assessee is a registered dealer under Kerala General Sales Tax Act, 1963 and is liable to pay tax under Section 5(1) of the Act. By virtue of the amendment in the Act, Section 7 is also introduced, whereby a dealer could exercise his option of composition of payment of tax at the rate or rates specified in the Act and the Schedules appended to the Section. Under sub-section (7) of Section 7 of the Act, a contractor in civil works may at his option, instead of paying tax in accordance with clause (iv) of that sub-section, pay tax at the rate of 2% on the whole amount of contract. The other sub-section is (7A) of Section 7 of the Act. The other contractors not covered under sub-section (7) may also opt to pay tax, instead of paying tax under sub-section (1) of Section 5 of the Act, on the whole amount of contract at the rate of seventy five per cent of the rates shown in the Fourth Schedule against such contract, less any tax paid under the Act on the purchase of any goods used in such contract, the transfer of which to the works contract was effected without any processing or manufacture. The compounding scheme is the alternate method of discharging the tax liability under the Act. The intention of the law makers is to provide 'hassle-free' tax compliance scheme as an alternative to actual basis which is popularly known as Regular Assessment Procedure. To get the concession of paying tax under Rule 30A of the Kerala General Sales Tax Act, 1963, a contractor had to make an application to exercise his option before the concerned assessing authority in Form 21B appended to the Rules. The assessing authority on receipt of the application, after making enquiries has to pass an order granting or rejecting the application; if the prayer in the application is granted, the assessing authority is bound to issue to the contractor Form 21BA permitting to pay tax either under sub-sections (7) or (7A) of the Act. In the present case, though an application is filed by the assessee seeking permission to pay tax at the compounded rate, such an application is not accepted by the

assessing authority. Therefore, the assessee was bound to complete the assessment for the assessment year 1993-94 under Section 5(1) of the Act. Instead of that, the assessing authority completes the assessment levying tax as provided in sub-section (7A) of Section 7 of the Act. The procedure adopted by the assessing authority, in our view, is contrary to the provisions of the Act and the rules framed thereunder. Therefore, the order of assessment passed by the assessing authority and the subsequent orders passed by the first appellate authority and the Tribunal requires to be set aside and the matter requires to be remanded to the assessing authority to redo the matter in accordance with law. Accordingly, the following:

O r d e r

(i) Revision Petition is allowed. The order passed by the assessing authority and the subsequent orders passed by the first appellate authority and the Tribunal are set aside.

(ii) The matter is remanded to the assessing authority to re-do the matter in accordance with law, in the light of the observations made by us in the course of our order.

(iii) In the facts and circumstances of the case, parties are directed to bear their own costs.

Ordered accordingly.

H.L.Dattu
Chief Justice

K.M.Joseph
Judge

vku/DK.